

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

86

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

CASSIUS J. DORSEY,

Appellant

No. 24,578

BRIEF OF APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

CASSIUS J. DORSEY,

Appellant

No. 24,578

BRIEF OF APPELLANT

ISSUES PRESENTED FOR REVIEW*

The following issues are presented for review:

1. Whether special policemen authorized by 4 D.C. Code §115 have the authority to arrest persons for apparent violations of 22 D.C. Code §3204 (carrying a dangerous weapon) committed in their presence.

2. Whether the defendant's waiver of a jury trial, defense counsel's agreement to incorporate by reference the testimony given by the special policeman at the hearing on the motion to suppress, the other stipulations of defense counsel to the essential elements of the crime and the failure of the defendant to testify on his own behalf or present evidence on his own behalf amounted in and legal effect to a plea of

*This case has not previously been before this Court under the same or a similar title.

guilty to the charge and required the trial court to ascertain from defendant pursuant to Rule 11 of the Federal Rules of Criminal Procedure whether he understood the nature of the charge and the consequences of his plea.

REFERENCES TO RULINGS

The references to the rulings of the District Court on which this appeal is based are the following:

1. The written order of Judge Pratt, dated March 10, 1970, denying appellant's motion to suppress.
2. The judgment of Judge Pratt finding defendant guilty of the charge. (Tr. 16-17)

STATEMENT OF THE CASE

This is an appeal from a conviction of appellant for carrying a dangerous weapon, 22 D.C. Code §3204.

PROCEEDINGS BELOW

Appellant was indicted on February 10, 1970, for carrying

"openly and concealed on or about his person and not in his dwelling house and not in his place of business and not on other land possessed by him, a dangerous weapon, capable of being so concealed, that is, a pistol, without a license issued as provided by law."

On February 26, 1970, appellant entered a plea of not guilty to the charge and through counsel moved to suppress

the evidence to be given by a special police officer. A hearing was held on the motion at that time (Mo. Tr. 1-41).^{1/} On March 10, 1970, Judge Pratt denied the motion to suppress in a written order.

On March 19, 1970, appellant was tried by the Court without a jury and found guilty as indicted.

On March 23, 1970, the United States Attorney filed an "Information as to Previous Conviction" in which he reported that the appellant had entered a plea of guilty to carrying a dangerous weapon in violation of 22 D.C. Code §3204 on June 19, 1969, in the District of Columbia Court of General Sessions and that Judge Halleck had sentenced him to 9 months imprisonment, suspended, and placed him on probation.

On May 28, 1970, Judge Pratt sentenced appellant to be committed to the custody of the Attorney General pursuant to the provisions of Title 18, United States Code, Section 5010(b) of The Federal Youth Corrections Act.

On July 27, 1970, appellant filed pro se a "Petition for Appeal and Appeal Bond" on the basis that he had instructed his Court appointed counsel to appeal, but that such appeal had not been filed. The petition was granted by Judge Pratt on August 21, 1970.

The undersigned counsel was appointed by this Court to represent appellant on September 8, 1970.

^{1/}Reference to the hearing on the motion to suppress will be designated "Mo. Tr." and references to the trial will be referred to as "Tr."

On November 17, 1970, the appellee filed a motion to dismiss appeal on the basis that appellant had failed to file a notice of appeal within the time prescribed by law. This motion was opposed by appellant on November 23, 1970.^{2/}

On December 17, 1970, this Court denied appellee's motion to dismiss the appeal.

STATEMENT OF FACTS

The oral testimony in the case was supplied by a single witness, one Mosley L. Jones, who is self-employed as a "licensed investigator" (Mo. Tr. 13).

On December 12, 1969, Mr. Jones had been retained by and was working at Target Liquor Supplies, 500 Kennedy Street, N.W., Washington, D.C., for the purpose of providing protective service to the store (Mo. Tr. 14, 26). On that date Mr. Jones testified that he first saw appellant at roughly 3:00 or 3:10 p.m.^{3/} At that time appellant made a purchase and left. (Mo. Tr. 15)

Thereafter appellant returned to the store at about 4:45 p.m. and ordered some cigarettes (Mo. Tr. 15).

^{2/} On the same date appellant requested that the Court defer the date for the filing of his brief until thirty days after this Court ruled on appellee's motion to dismiss the appeal. The Court granted appellant's motion on November 24, 1970.

^{3/} He testified that he had seen appellant on other occasions before December 12 at the same liquor store (Mo. Tr. 14-15).

Jones, who was dressed in plain clothes, and who "doubled as a sales clerk" (Mo. Tr. 27), waited on appellant (Mo. Tr. 15-16). At the time Jones handed the cigarettes to appellant he "noticed a small caliber revolver placed at the top of his pants, in the top of his pants" (Mo. Tr. 17). Jones then asked appellant whether he had a firearms permit. Appellant indicated that he did, but produced only a draft card (Mo. Tr. 17). Jones testified:

"At this point I pulled my service revolver and asked him not to move. And, you know, asked him to clean his pockets out, began searching him" (Mo. Tr. 17).

When Jones disarmed appellant, he ascertained that the gun was a .22 caliber revolver and contained ammunition (Mo. Tr. 17-18).

Jones further testified on direct that he requested an employee of the store to call the police for transport; that he asked appellant why he carried a gun and appellant told him that he worked for the government and handled large sums of money; that he again asked appellant to produce a license for the gun, but appellant failed to do so. (Mo. Tr. 18)

On cross-examination, Jones added that at the time he (Jones) drew his gun he showed appellant his badge and identification as a licensed investigator (Mo. Tr. 22).

On further examination by Judge Pratt -- and on the suggestion of Judge Pratt -- Jones stated that when he placed appellant under arrest he informed appellant that he was under arrest, that he had a right to counsel and a right to remain

silent (Mo. Tr. 27-28). ^{4/}

The foregoing testimony was given at the hearing on appellant's motion to suppress. After the denial of the motion on March 10, 1970, the case came on for trial on March 19, 1970. At the trial, appellant waived trial by jury (Tr. 13-14).

With the approval of appellant's court appointed counsel in the District Court, the previous testimony given by Jones in the hearing on the motion to suppress was "incorporated by reference" into the proceedings of March 19, 1970 (Tr. 14).

The defendant failed to take the stand (Tr. 15).

When the Court thereafter announced that it was prepared to make a finding, the Assistant United States Attorney stated:

"I think I must introduce other evidence to cover the elements of the crime" (Tr. 15).

Thereafter, stipulations were entered into between counsel on the following matters:

1. The District of Columbia certificate to the effect that appellant had no license to carry a gun on the day in question (Tr. 16).

^{4/} When Judge Pratt suggested that Jones might also have informed appellant that anything he said might be used against him, Jones agreed (Mo. Tr. 28).

2. That the gun involved would test fire (Tr. 16).
3. That appellant did not own the premises on which he was arrested for carrying the dangerous weapon (Tr. 16).
4. That appellant would introduce no evidence on his own behalf (Tr. 16).

Thereafter, the Court promptly found appellant guilty of a violation of 22 D.C. Code §3204 (Tr. 16-17).

STATUTES INVOLVED

22 D.C. Code §3204

"No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215 unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or a felony either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years."

4 D.C. Code §115

"The Commissioners of the District of Columbia, on application of any corporation or any individual, or in their own discretion, may appoint special policemen for duty in connection with the property of, or under the charge of such corporation or individual; said special policeman to be paid wholly by the corporation or person on whose account their appointments are made, and to be subject

to such general regulations as the said Commissioners may prescribe."

Rule 11, Federal Rules of Criminal Procedure

"A defendant may plead not guilty, guilty or, with the consent of the court nolo contendere. The court may refuse to accept a plea of guilty and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear the court shall enter a plea of not guilty."

ARGUMENT

I

Special Police Officers Lack The
Authority To Arrest Persons For
Apparent Violations of 22 D.C. Code §3204

The first issue raised by this appeal is the extent of the arrest powers of special policemen commissioned under 4 D.C. Code §115.

This Court in Gaither v. United States, 134 U.S. App. D.C. 170, 413 F.2d 1061 (D.C. Cir. 1969), stated that it did not have to reach the issue of the special policemen's arrest powers because the special officer at the time of the arrest knew from general knowledge that the shoplifter had had taken a sufficient amount of merchandise to constitute a grand larceny -- a felony.^{5/}

^{5/} It is settled that even a private citizen may arrest for a felony committed in his presence. Shettel v. United States, 72 App. D.C. 250, 113 F.2d 34 (D.C. Cir. 1940).

Here, the special officer's knowledge was limited to observing the pistol in the top of the defendant's pants. This is an apparent violation of 22 D.C. Code §3204 and is ordinarily punished as a misdemeanor, 22 D.C. Code §3215. It is true, of course, that ultimately defendant was tried and convicted on a felony charge, but the only reason for that was his previous conviction for carrying a dangerous weapon. There was no evidence in this case that Special Officer Jones knew of appellant's prior conviction for carrying a dangerous weapon. Thus, when Special Officer Jones arrested appellant without a warrant, he was arresting him for an apparent misdemeanor and one admittedly not involving a breach of the peace.

The rule of common law, which has not been changed by statutory rule or judicial construction in this jurisdiction, is that a private citizen may arrest for misdemeanors involving breaches of the peace and felonies when such crimes are committed in his presence, but may not arrest for misdemeanors committed in his presence which do not involve breaches of the peace. Restatement (Second) Torts §119 (1965).

The issue thus becomes whether 4 D.C. Code §115 or any other provision of law confers upon special policemen powers of arrest superior to those possessed by a private citizen.

In Singleton v. United States, 225 A.2d 315

(DCCA 1967), the District of Columbia Court of Appeals held that a special police officer commissioned under 4 D.C. §115 and stationed to work in a department store may arrest a person whom he has probable cause to believe has committed the misdemeanor of petit larceny. The Court held:

"We...hold that while on duty and in his prescribed area of authority, a special policeman may arrest when he has probable cause to believe that the arrested person has perpetrated the crime of petit larceny on the merchandise of his employer."

In the Gaither case, this Court found that it did not have to pass on the issue decided in Singleton since a grand larceny was obviously involved. The present case affords this Court its first opportunity to evaluate the Singleton ruling and to determine its limits.

It is evident from the carefully worded opinion of Judge Quinn in Singleton quoted above, that the rule is in terms limited arrests for the misdemeanor of petit larceny. It does not purport to pass on the validity of a special officer's arrest for a violation of 18 D.C. Code §3204.

There is logic for making a distinction between the two situations. The entire history of the use of special officers, as outlined by the Supreme Court in NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416, 429 (1947), is pointed toward the protection of private property. The only reason, for example, why a department store employs special officers is to guard against shop lifting. There is, therefore, some practical logic in permitting special officers to arrest

persons for petit larceny.

There is a substantial issue, however, as to whether this very limited and specific authority given to special officers in shoplifting cases should be broadened to give them general authority to arrest for other misdemeanors committed in their presence not involving breaches of the peace, and particularly the misdemeanor of carrying a dangerous weapon. When the special officer moves out of his traditional and somewhat passive role as a protector of private property against theft into the more active role as a person confronting, arresting and disarming individuals carrying dangerous weapons, there is a clear danger that the exercise of such arrest powers by persons who are not full time policemen and trained as such could be counterproductive in terms of reducing the violence involved in liquor store holdups. Where, as here, a non-uniformed special officer who appears to be an ordinary employee of the liquor store, suddenly confronts a person carrying a dangerous weapon, arrests him and seeks to disarm him, he and every other member of the public in the store are involved in an extremely dangerous situation, and one which could very likely result in a shooting. It is submitted that untrained special officers should not be given arrest powers in those circumstances because of the likelihood that their actions will result in increasing the probability of a shooting. No such comparable danger results from giving special officers

the right to arrest persons for petit larceny.

It may be argued that such a rule would leave store owners and operators practically defenseless against persons carrying dangerous weapons in their stores. It is submitted, however, that a defense based on a special officer arresting and disarming such persons is illusory at best, and at worst could lead to shootings that may never have occurred if the special officer had not sought to make the arrest.

The public, it is submitted, cannot tolerate a rule which, in effect, encourages confrontations and shootouts between special officers and those carrying dangerous weapons in stores frequented by the public. The public has no assurance that the special officer is as trained as a metropolitan policeman or has the skills, judgment and experience of a metropolitan policeman. In this highly urban and densely populated metropolitan area, the law should be moving away from and not toward a vigilante concept of apprehending suspected criminals.

For the foregoing reasons the appellant respectfully requests that the Court limit the Singleton case to approval of arrests by special officers in petit larceny cases.

II

Appellant's "Trial" Amounted To A Plea of
Guilty Made Without Meeting The Requirements
of Rule 11, Federal Rules of Criminal Procedure

As can be seen from the statement of the case, the "trial" in this case was somewhat unusual.

The only witness was Special Officer Jones who had testified on February 26, 1970, in a hearing on defendant's motion to suppress evidence. The "trial" of March 19, 1970, consumed exactly four pages of stenographic transcript (Tr. 14-17). It began by a waiver of jury trial (Tr. 13-14), proceeded to an incorporation "by reference" of the testimony given some three weeks earlier by Special Officer Jones (Tr. 14), and a statement by defendant's counsel that the defendant would not take the stand because "I don't think there is any conflict as to any of the testimony here..." (Tr. 15). The Court then announced that it was "prepared to make a finding" (Tr. 15). Realizing that the testimony of Jones was insufficient to support a finding of guilt, the United States Attorney then proceeded to obtain the following stipulations from counsel for the defendant:

1. That defendant did not possess a license to carry the pistol (Tr. 15-16).
2. That the gun would test fire (Tr. 16).
3. That defendant did not own the premises occupied

by the liquor store (Tr. 16); and

4. That defendant would offer no testimony (Tr. 16).

With these details out of the way, the Court proceeded to find the defendant guilty (Tr. 16-17).

Appellant does not necessarily quarrel with the incorporation of Jones' testimony given on the motion to suppress at the trial or with the stipulations entered into between the United States Attorney and defendant's counsel. It is apparent, however, to the most casual reader of the record that what was involved on March 19, 1970, was not a trial in any sense of the word, but rather a plea of guilty to the charge of carrying a dangerous weapon.

The legal vice in these proceedings was the fact that although in essence a plea of guilty was being entered, the Court did not inquire of appellant as to whether the plea was being given voluntarily with an understanding of the nature of the charge and the possible consequences of the plea.

In Julian v. United States, 236 F.2d 155 (6th Cir. 1956)^{6/}, the Sixth Circuit reversed a conviction of a defendant in similar circumstances. In that case the defendant was accused of wilfully refusing to obey an order of a Selective Service Board. In the proceedings in the trial

^{6/} The Julian case was cited with approval by this Court in Rucker v. United States, 108 U.S. App. D.C. 75, 280 F.2d 623 (D.C. Cir. 1960).

court, the defendant waived trial by jury and entered into a series of stipulations with counsel for the government admitting (1) that the Selective Service Board order in question was given, (2) that the defendant was within the age covered by the Selective Service Act and resided in the area covered by the local board, (3) that defendant had knowledge of the order, but wilfully refused to obey it, (4) that the defendant would offer no defense; and (5) that the defendant would not testify in his own behalf.

The Sixth Circuit found that the practical effect of the admissions was a plea of guilty. The Court noted that Rule 11 of the Federal Rules of Criminal Procedure was a restatement of previously existing law and practice, and that it was essential to a fair trial that the Court insure that a defendant understand the nature of the charge to which he was pleading guilty:

"Here the judge neither questioned defendant as to intent, as to whether he had wilfully violated the order, as to whether he pleaded guilty, nor discussed the matter with defendant in any way." 236 F.2d at 158

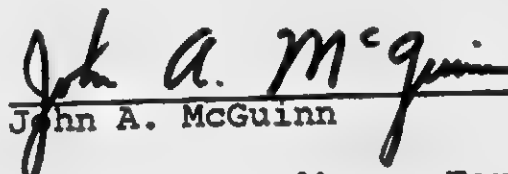
In the present case, the agreement to incorporate "by reference" the testimony of Special Officer Jones, the other stipulations and the failure of defendant to present any evidence or to testify himself is likewise tantamount to a plea of guilty. And, similarly, in the present case, the judge did not discuss in any way with the defendant his

understanding of the stipulations being made on his behalf or their practical effect as a plea of guilty.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed.

Respectfully submitted,

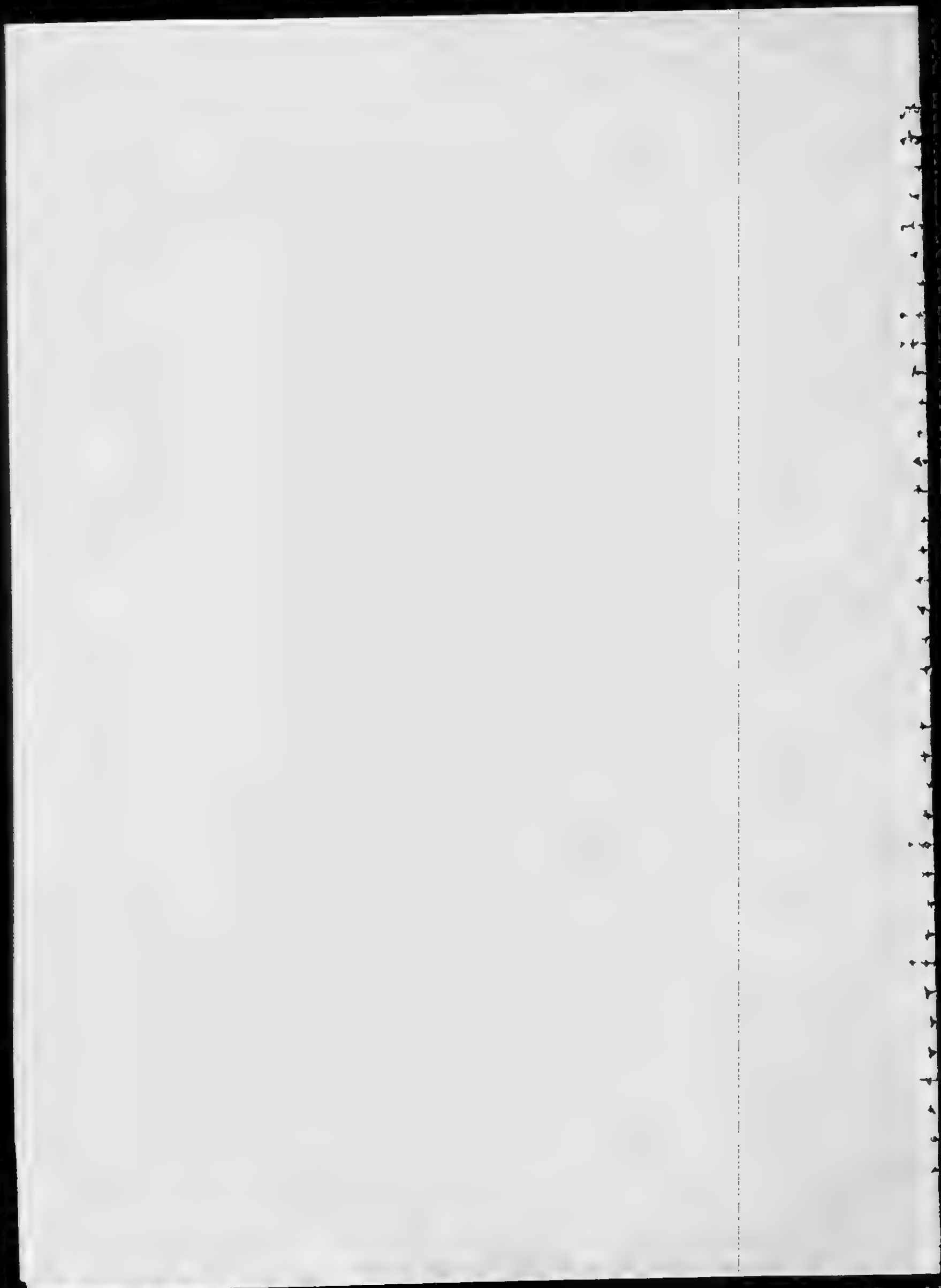

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January 1971 two copies of the foregoing Brief of Appellant were served on Thomas Flannery, United States Attorney, United States Court-house, John Marshall Square, Washington, D.C.


John A. McGuinn



BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,578

UNITED STATES OF AMERICA, APPELLEE

v.

CASSIUS J. DORSEY, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN G. GILL, JR.,
CHARLES H. ROISTACHER,
Assistant United States Attorneys.

Cr. No. 242-70

United States Court of Appeals
for the District of Columbia Circuit

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* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether a special police officer, while rendering protective services at a liquor store, validly arrested appellant when he entered the store while openly and unlawfully carrying a pistol, and when the special police officer had reason to believe that appellant had no license to carry it?

2. Whether the court should have complied with FED. R. CRIM. P. 11 even though appellant did not enter or seek to enter a plea of guilty?

* This case has not previously been before this Court.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,578

UNITED STATES OF AMERICA, APPELLEE

v.

CASSIUS J. DORSEY, APPELLANT

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a one-count indictment filed February 10, 1970, appellant was charged with carrying a pistol without a license in violation of 22 D.C. Code § 3204. On February 26, 1970, an evidentiary hearing was held on appellant's motion to suppress evidence before the Honorable John H. Pratt, at the conclusion of which Judge Pratt took the matter under advisement. By an order filed March 10, 1970, Judge Pratt denied appellant's motion to suppress. On March 19 appellant waived trial by jury and was tried by the court and found guilty as charged. On May 25, 1970, Judge Pratt sentenced appellant pursuant

to the Federal Youth Corrections Act, 18 U.S.C. § 5010 (b).¹ This appeal followed.

The Hearing on the Motion to Suppress

Mr. Mosley L. Jones, a special police officer commissioned by the Metropolitan Police, testified that on December 12, 1969, he was working in plain clothes at Target Liquor Supplies, located at 500 Kennedy Street, N.W. (Tr. I, 13-14, 31).² Target had been robbed twice in the past, and Mr. Jones had been working there for approximately nine months, rendering protective services and occasionally doubling as a salesclerk. At approximately 3:00 p.m. on that date appellant entered the liquor store and purchased a half-pint of Gilbey's gin.³ He returned at approximately 4:45 p.m. and attempted to purchase a package of king-sized Kool cigarettes from Jones, who was then working behind the counter. As Jones was in the process of handing the Kools to appellant, who was approximately two to three feet away, he "noticed a small caliber revolver placed at the top of his pants, in the top of his pants" (Tr. I, 17). The officer immediately asked appellant if he had a permit to carry the weapon. Appellant answered in the affirmative, but instead of producing a permit, he showed Jones his draft card. Jones then showed appellant his special police officer identification and badge, placed him under arrest, and removed the loaded .22 caliber revolver from appellant's trousers. The special police officer advised appellant of his

¹ At the conclusion of the trial on March 19, in the presence of appellant and his counsel, the prosecutor filed an information as to appellant's prior conviction of carrying a dangerous weapon, thus enabling the court, if it wished, to impose an enhanced penalty. See 22 D.C. Code § 3204.

² "Tr. I" refers to the transcript of the hearing on the motion to suppress held on February 26, 1970; "Tr. II" refers to the transcript of the trial held on March 19, 1970.

³ Mr. Jones testified that appellant had made "small purchases of alcoholic beverages" as well as potato chips, chewing gum and cigarettes during the preceding week (Tr. I, 15).

rights and then asked appellant if he had a license to carry the revolver. Appellant said that he did not and that he carried the weapon because "he was employed by the government and that he handled large sums of money" (Tr. I, 18). In the meantime Officer Jones asked an otherwise unidentified employee of the liquor store to summon a Metropolitan Police transport vehicle (Tr. I, 13-36).

At the conclusion of the hearing appellant's counsel argued that appellant's arrest was illegal because Officer Jones "would be bound by the same rules of evidence that would apply to citizen's arrest" (Tr. I, 36). The court took appellant's motion under advisement, and in an order issued on March 10, 1970, citing *Singleton v. United States*, 225 A.2d 315 (D.C. Ct. App. 1967), the court denied the motion, ruling "that a special police officer may arrest a person for the misdemeanor of carrying a dangerous weapon committed in the officer's presence."

The Trial

At trial and in appellant's presence, his counsel indicated to the court that he had fully discussed the case with appellant and that it was agreed that (1) appellant did not wish to offer any evidence but wanted to preserve his right to appeal the adverse ruling on his motions⁴ by having a trial by the court, and (2) there was no need for Mr. Jones to repeat his pretrial testimony given at the hearing on the motion to suppress.⁵ Accordingly, the

⁴ Immediately prior to trial, appellant's counsel also moved to dismiss the indictment because the prosecutor before the grand jury, in response to a juror's question to Officer Jones, stated that both special police officers and private investigators could carry guns during the course of their employment if they were appropriately commissioned. Appellant's motion, which was apparently based on the allegation that this statement of the prosecutor amounted to his testifying before the grand jury without being sworn as a witness, was denied. That denial is not challenged in this appeal (Tr. II, 3-10).

⁵ Appellant's counsel stated, "I have no objection to Your Honor taking into consideration the testimony as it was the other day. I

following colloquy took place:

THE COURT: Mr. Dorsey, as you know, you have got the right to a speedy trial by jury with the assistance of counsel. If I sign the document that you have just signed you will waive that right. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: How old are you?

THE DEFENDANT: Twenty-one.

THE COURT: You are fully aware that by signing that document, you have waived your right to a trial by jury?

THE DEFENDANT: Yes, sir.

THE COURT: And you are doing that freely and voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: And you are willing to have your case tried by the Court without a jury?

THE DEFENDANT: Yes, sir.

THE COURT: Very well, we will proceed.

THE DEFENDANT: Thank you. (Tr. II, 13-14.)

In accordance with counsel's previous suggestion, the trial court incorporated Officer Jones' earlier testimony by reference (Tr. II, 14). It was then stipulated that (1) appellant had no license to carry a pistol in the District of Columbia on December 12, 1969; (2) appellant's revolver was operable; and (3) Target Liquor Supplies was not owned by appellant (Tr. II, 15-16). Both the Government and the defense then rested, and the trial court found appellant guilty as charged (Tr. II, 16-17).

don't think the government can add anything to it or subtract anything from it. I will let it go as it is without taking up any more of the Court's time. We will submit it." (Tr. II, 12-13.)

ARGUMENT

I. Appellant was lawfully arrested.

(Tr. I, 25-26)

Appellant concedes that Special Police Officer Jones arrested him for an apparent misdemeanor committed in the officer's presence, but he argues here, as he did in the trial court, that this arrest was illegal. Specifically appellant urges that, with the exception of arrests for petit larceny, a special police officer stands on the same footing as a private citizen and may only arrest misdemeanants if their crimes amount to a breach of the peace. This argument is untenable.

4 D.C. Code § 115 authorizes the Commissioner of the District of Columbia to appoint special policemen in connection with the guarding of privately owned property, and while on duty they may, unlike private citizens, carry firearms. 22 D.C. Code § 3205; see *Franklin v. United States*, 271 A.2d 784 (D.C. Ct. App. 1970); *McKenzie v. United States*, 158 A.2d 919 (D.C. Ct. App. 1960). Indeed "[i]t is a common practice in this country for private watchman or guards to be vested with the powers of policeman, sheriffs or peace officers to protect the private property of their employers. *And when they are performing their police functions, they are acting as public officers and assume all the powers and liabilities attaching thereto.*" *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 429 (1947) (emphasis added; citations omitted). Since a police officer can arrest for a misdemeanor committed in his presence without a warrant, 4 D.C. Code § 140 (Supp. III, 1970), under *Jones & Laughlin* a special officer may therefore do likewise when the crime is committed while he is on duty protecting the property of his employer.

Appellant recognizes the District of Columbia Court of Appeals' decision in *Singleton v. United States*, 225 A.2d

315 (D.C. Ct. App. 1967),⁶ but argues that the holding in that case should be limited to arrests for petit larceny. In this regard appellant claims "that untrained special police officers should not be given arrest powers in those circumstances [where they observe individuals illegally carrying weapons] because of the likelihood that their actions will result in increasing the probability of a shooting." (Brief for Appellant at 11.) We cannot agree with this proposed limitation.

It must be remembered that the special policeman is vested with powers above the ordinary citizen for the purpose of protecting the property of his employer. *NLRB v. Jones & Laughlin Steel Corp.*, *supra*, 331 U.S. at 429. In the case at bar, Target Liquors had been robbed twice, and Officer Jones' purpose in being at the store was to render protection against more of the same (Tr. I, 25-26). Since it cannot be denied that the use of a gun is a frequent method by which robberies are committed, upon seeing appellant's illegal weapon in plain view, Special Police Office Jones was entirely justified in arresting him and seizing the weapon to neutralize any danger to the safety or property of his employer. The alternative to an arrest at this point would have been to permit the gun-toter to leave the store if robbery was not his motive or, if it was, to get the upper hand on both the special police officer and his employer. Such a gamble is not only dangerous and impractical but also would frustrate the congressional intent underlying 4 D.C. Code § 115.

⁶In *Singleton* the court, relying on *NLRB v. Jones & Laughlin Steel Corp.*, *supra*, held that while on duty a special police officer was a police officer within the meaning of 23 D.C. Code § 306 and therefore could arrest a suspect upon probable cause for a petit larceny committed in the place of his employment.

II. Appellant did not plead guilty, and therefore FED. R. CRIM. P. 11 is inapplicable in this case.

(Tr. II, 12-13)

Appellant, relying on one case,⁷ argues that his trial amounted to a plea of guilty, and that because the court did not satisfy the requirements of FED. R. CRIM. P. 11, his conviction must be reversed. We strongly disagree: appellant did not plead guilty, and Rule 11 is therefore inapplicable. *United States v. Brown*, — U.S. App. D.C. —, 428 F.2d 1100 (1970).

A plea of guilty is "a waiver of all defenses known and unknown." *Edwards v. United States*, 103 U.S. App. D.C. 152, 154, 256 F.2d 707, 709, *cert. denied*, 358 U.S. 847 (1958). This includes "a waiver of the right to contest the admissibility of any evidence the State might have offered against the defendant" *McMann v. Richardson*, 397 U.S. 759, 766 (1970); *see also Brady v. United States*, 397 U.S. 742 (1970). Indeed, the right to contest the correctness of a ruling on a motion to suppress does not survive a guilty plea. *United States v. Ford*, 363 F.2d 375 (4th Cir. 1966).

With these principles in mind, we must determine if at appellant's trial he intended to waive *all* of his defenses. Clearly he did not. To the contrary, appellant's trial counsel affirmatively and successfully sought to preserve appellant's right to appeal the court's adverse ruling on his motions:

THE COURT: I think what you want is a verdict to preserve your right of appeal.

MR. PARKER [defense counsel]: That's right, Your Honor. As I say, I don't know. I was appointed to this case. I might be in perfect agreement with Your Honor on all points, but it is not for me. The Supreme Court [⁸] has said that I have to take this position. (Tr. II, 12-13.)

⁷ *Julian v. United States*, 236 F.2d 155 (6th Cir. 1956).

⁸ Counsel's statement concerning the Supreme Court probably refers to the Court's decision in *McMann v. Richardson*, *supra*, for,

Since appellant successfully preserved his right to contest the trial court's ruling on his motion, the fact that the trial proceeded largely by stipulation did not constitute a plea of guilty, and thus Rule 11 is inapplicable. *United States v. Brown, supra.*⁹

There remains the question of whether the trial court was required to address appellant personally with respect to the stipulations at trial. In *United States v. Brown, supra*, this Court held that "where a defendant in a criminal case seeks to waive trial on all issues except insanity the trial judge should address the defendant personally in determining whether the waiver is made voluntarily with understanding of the consequences of his act." — U.S. App. D.C. at —, 428 F.2d at 1103-1104. While so holding, this Court clearly indicated that the trial judge need address the defendant personally only "in the limited circumstances of this case, those circumstances being the mental condition of the defendant and the stipulation of counsel admitting all of the acts charged." — U.S. App. D.C. at —, 428 F.2d at 1102.

as stated above, a plea of guilty is a waiver of trial and, unless the law provides otherwise (which is not the case in the District of Columbia), is also a waiver of any right to contest the admissibility of evidence. 397 U.S. at 766. Therefore, had appellant pleaded guilty as he now urges, it would have foreclosed his contesting the admission into evidence of his revolver. The mere fact that he is in a position on this appeal to argue the admissibility of that evidence perforce defeats his "guilty plea" argument.

⁹ The *Julian* case, cited by appellant, is inapposite. In *Julian, supra* note 7, the defendant stipulated to the truth of all the facts alleged in the information and, unlike the case at bar, also stipulated to the fact that no defenses existed. The appellate court, realizing that the District Court itself considered Julian's actions tantamount to a guilty plea, held that Rule 11 should have been complied with. 236 F.2d at 157. As stated above, appellant in the case at bar exercised and preserved his Fourth Amendment constitutional defense.

Of course we recognize that, in accepting a waiver of trial by jury, the court should personally address the defendant to determine if he is freely and voluntarily waiving his right. FED. R. CRIM. P. 23 (a); see *United States v. Straite*, 138 U.S. App. D.C. 163, 425 F.2d 594 (1970). This was done in the case at bar.

Since those circumstances are not present in the case at bar,¹⁰ *Brown* is inapplicable. In addition, *Brown* applies only to cases tried after June 3, 1970, — U.S. App. D.C. at —, 428 F.2d at 1102, and appellant was tried on March 19, 1970.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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¹⁰ As mentioned above, the stipulation in *Brown* admitted the commission of the acts charged in the indictment. In the case at bar the pertinent stipulation was only to the pretrial testimony of Officer Jones.